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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of	) OAH No. 2014060674) FPPC No. 12/516
FRANK J. BURGESS, Respondent.	) **REPLY BRIEF OF THE ENFORCEMENT DIVISION OF THE FAIR POLITICAL PRACTICES COMMISSION RE: PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE H. STUART WAXMAN**) Date: March 19, 2015) Time: 10:00 a.m.) Place: 428 J Street, 8th Floor Hearing Room) Sacramento, CA 95814

The Enforcement Division of the Fair Political Practices Commission ("Commission") submits the following reply brief:

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I. INTRODUCTION

Respondent Burgess does not want to accept responsibility for his actions, and he has presented several arguments and theories as to why he should not be held responsible. However, his arguments and theories are largely unrelated to the procedural issue the Commission must decide: whether to adopt the Proposed Decision of ALJ Waxman with technical, clarifying changes, or whether to reject the Proposed Decision of ALJ Waxman, and decide the case itself upon the record.

It should be noted that Respondent's substantive arguments and theories are unpersuasive. The Commission does not have authority to rule on the constitutionality of any provisions of the Political Reform Act.[1] Even so, Respondent was afforded all constitutional protections. Additionally, the evidence admitted at the Administrative Hearing overwhelmingly proved each element of Respondent's violation of Government Code section 87100. Furthermore, the evidence admitted at the Administrative Hearing was more than sufficient to support an order that Respondent pay the maximum penalty of $5,000.

II. THE COMMISSION MAY MAKE CHANGES TO THE PROPOSED DECISION OR DECIDE THE CASE UPON THE RECORD

A. Adopt and Make Changes to the Proposed Decision

1. Applicable Law for Respondent's Violation: Sections 87100 and 87103

The Commission may adopt and make changes to the Proposed Decision pursuant to Section 11517, subdivision (c)(2)(C). The law applicable to the Proposed Decision is stated in the Accusation, and includes Sections 87100 and 87103, subdivision (d), as well as the Commission Regulations interpreting these statutes. This law applies to the entire Proposed Decision. Indeed, the Proposed Decision specifically found that Respondent violated Section 87100 when he attempted to use his official position to influence a governmental decision which directly impacted the corporation for which he was president (Proposed Decision, p.4,¶1.) The different sections of the Proposed Decision may not be considered in a vacuum as Respondent urges. The Administrative Procedure Act (the

[1] The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

"APA")[2] requires that the Proposed Decision be considered in its entirety and read as a whole. (See Section 11517(c).) Additionally, Section 81003 requires that the Act be liberally construed to achieve its purposes. Reading the Proposed Decision as a whole satisfies the requirements of both the APA and the Act.

2. Case Law Cited by Respondent is Distinguishable

Respondent argues that case law prohibits the Commission from making the changes proposed by the Enforcement Division, citing *Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal. App. 4th 296. However, the *Ventimiglia* decision is procedurally and factually distinguishable from the present case.

Ventimiglia involved a marriage and family therapist whose license was revoked in proceedings pursuant to the APA. (*Ventimiglia, supra,* 168 Cal.App.4th at p. 299.) The therapist argued that the Board of Behavioral Sciences (BBS) failed to exercise its discretion to impose a lesser penalty, and brought a petition for writ of mandate. (*Id.* at p. 300.) The superior court agreed with the therapist, and directed the BBS to set aside its decision, review the record, and re-determine the penalty imposed. (*Id.* at p. 301.) On remand, the BBS issued a new decision with findings of fact and conclusions of law which were at odds with the original proposed decision of the ALJ, adding 11 pages and including 18 new paragraphs of new factual findings. (*Id.* at pp. 301, 307.) The BBS did not give the therapist the opportunity to present either oral or written argument before the BBS addressing these new findings and conclusions of law. The therapist brought a second petition for writ of mandate, arguing that on remand, the BBS should have followed the procedural safeguards enumerated in Section 11517, subdivision (c)(2)(E)(ii). (*Id.* at p. 302.) The BBS argued that Section 11517, subdivision (c)(2)(E)(ii) did not apply on remand. (*Id.* at p. 302.) The trial court agreed with the BBS, but the court of appeal found that:

> The Board's new findings and conclusions went far beyond the clarifying modifications allowed under Section 11517, subdivision (c)(2)(C). The new language in the Board's decision affected the factual and legal basis of the proposed decision, particularly because Ventimiglia's efforts at rehabilitation were addressed at length, a subject not reached by the administrative law judge in the proposed decision because of his belief that revocation was mandatory. (*Id.* at p. 307.)

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[2] The California Administrative Procedure Act, which governs administrative adjudications, is contained in Sections 11370 through 11529 of the Government Code.

The court further held that the BBS essentially rejected the ALJ's proposed decision, and therefore, should have allowed the therapist the opportunity to present either oral or written argument before the agency itself pursuant to Section 11517, subdivision (c)(2)(E). (*Id.* at pp. 308-314.)

The *Ventimiglia* decision is procedurally and factually distinguishable from the present case. Procedurally, in *Ventimiglia*, the BBS was ordered by the appellate court to review the record and re-determine the penalty imposed. No court has ordered the Commission to review the record and re-determine any part of this case. That decision is for the Commission to make at this procedural stage.

Factually, should the Commission choose to adopt the Proposed Decision with clarifying changes, the changes proposed by the Enforcement Division are minimal, as opposed to the extensive changes of fact and law made by the BBS in *Ventimiglia*. In *Ventimiglia*, the new decision issued by the BBS stated findings of fact and conclusions of law which were contrary to the original proposed decision of the ALJ, adding 11 pages and 18 paragraphs of new factual findings. Further, the BBS issued new legal conclusions that directly contradicted the ALJ's legal conclusion that the evidence supported a lesser penalty than revocation.

In contrast, the Enforcement Division has proposed only typographical changes to the findings of fact. Additionally, the Enforcement Division has proposed minimal, clarifying changes to ALJ Waxman's legal conclusions, leaving the ultimate legal basis of the conclusions, Sections 87100 and 87103, subdivision (d), unchanged.

3. Changes Proposed are Clarifying in Nature

Respondent contends that the changes proposed by the Enforcement Division to the Proposed Decision "...go far beyond what is permitted by Section 11517(c)(2)(C) as they clearly affect the 'factual or legal basis' of the Proposed Decision." (Response Brief, p. 11:13-15.) The Enforcement Division disagrees.

The Enforcement Division has proposed only typographical changes to the findings of fact in the Proposed Decision. Thus, the factual basis of the Proposed Decision is not affected.

The Enforcement Division does not dispute that ALJ Waxman cited incorrect *regulations* in the Proposed Decision. However, ALJ Waxman's mistakes were harmless error because the proposed

changes will not affect the *statutes* which provide the legal basis of the Proposed Decision, thus the changes are clarifying and of a similar nature as allowed by Section 11517(c)(2)(C).

Respondent argues that two elements of the conflicts of interests analysis, economic interest and reasonable foreseeability, are more than clarifying changes. However, ALJ Waxman analyzed these two elements using the language of the relevant statutes, Sections 87100 and 87103, and the Enforcement Division proposes no changes to the statutes' citations or analysis of the statutes' language.

Regarding the element of economic interest, ALJ Waxman mistakenly cited to the regulations for source of income and personal finances in paragraph 11 of the Proposed Decision. However, the Proposed Decision also cites Sections 87100 and 87103, which include identical language as the correct regulation – Regulation 18703.1. (See Complainant's Opening Brief, p. 16:1-17:5.) The Commission is charged with implementing regulations to interpret the Act, and the Commission used the language of Section 87103, subdivision (d)[3] in Regulation 18703.1. subdivision (b)[4] without further interpretation.[5] Thus, regarding the element of economic interest, the proposed changes do not affect the legal basis of the Proposed Decision.

Regarding the element of reasonable foreseeability, ALJ Waxman's use of the 2014 version of Regulation 18706 is harmless error. Section 87103, which establishes the reasonably foreseeable requirement, was applicable in both 2010 and 2014, and is correctly cited in the Proposed Decision. (Proposed Decision, p5,¶6.)

Additionally, the factors enumerated in the 2010 version of Regulation 18706 were "not intended to be an exclusive list of the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable, but are included as general guidelines..." (Regulation 18706, subdivision (b) (2010).)[6] Respondent misleadingly presents the factors that were present in the 2010

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[3] A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following: ... (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103.)

[4] For purposes of disqualification under Government Code sections 87100 and 87103, a public official has an economic interest in a business entity if any of the following are true: ... (b) The public official is a director, officer, partner, trustee, employee, or holds any position of management in the business entity. (Regulation 18703.1.)

[5] Regulation 18703.1 was in full force and effect on April 6, 2010, and was repealed operative September 11, 2014.

[6] Respondent Burgess did not include the introductory paragraph of subdivision (b) in his Response Brief. (Response Brief, p. 12:15-28.)

version of the regulation as required elements that must be considered when determining reasonable foreseeability.

Respondent also purports that "realistic possibility" is a new concept in the 2014 version that is not synonymous with reasonable foreseeability before 2014. However, since the inception of the Act, reasonable foreseeability has always been an element of conflicts of interests violations, and the Commission has continually interpreted the reasonably foreseeable element in Section 87103 as more than a mere possibility, but less than a certainty.

The Commission first ruled on the reasonably foreseeable element in Section 87103 in 1975, in its opinion *In re Thorner* (1975) 1 FPPC Ops 198, finding that the Act required "foreseeability, not certainty." (*In re Thorner*, 1 FPPC Ops at p. 215.) For a financial effect to have been reasonably foreseeable, the Commission determined that there must have been a "substantial probability," "high probability," and/or "sufficient likelihood," of a material financial effect on the economic interest, based upon the facts and circumstances of the case. (*Id.*, at pp. 211, 216 and 217.)

Since *Thorner*, the Commission has continually interpreted the reasonably foreseeable element in Section 87103 in the same manner, despite the 2014 change in Regulation 18706. (See *Harron Advice Letter* (1984) A-83-283 and A-84-005 [citing *Thorner*, "The statute does not require that the financial effect be certain; a substantial likelihood or probability is sufficient."]; *Moock Advice Letter* (2001) A-01-150 [citing *Thorner*, "An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if the effect is a mere possibility, it is not reasonably foreseeable."]; *Miller Advice Letter* (2010) A-10-197 [citing *Thorner*, "A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility."]; *Vail Advice Letter* (2014) A-14-192 ["[I]f the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."]

Additionally, the Enforcement Division concedes that the 2014 version includes a presumption that was not present in the 2010 version. However, ALJ Waxman analyzed the evidence regarding

reasonable foreseeability in spite of the presumption enumerated in the 2014 version. Thus, ALJ Waxman's analysis regarding the presumption is also harmless error.

Consequently, ALJ Waxman's analysis of the evidence in this case regarding the reasonably foreseeable element under the 2014 version is exactly the same analysis as is made under the 2010 version of Regulation 18706. (See Complainant's Opening Brief, p. 17:7-19:15.) Therefore, regarding the element of reasonable foreseeability, the proposed changes do not affect the legal basis of the Proposed Decision.

B. Reject the Proposed Decision and Decide the Case Upon the Record

Respondent argues that the Commission should "reject the decision outright." (Response Brief, p. 14, 9-10.) However, the Commission does not have authority to reject the decision outright. Pursuant to Section 11517, subdivision (c)(2), if the Commission rejects the Proposed Decision, the Commission may either:

- Refer the case back to ALJ Waxman to take additional evidence and prepare a revised, proposed decision. (Section 11517, subd. (c)(2)(D).); or
- Decide the case itself upon the record, including the transcript, with or without taking additional evidence. (Section 11517, subd. (c)(2)(E).)[7]

The first option, referring the case back to ALJ Waxman, does not apply to this case because there is no additional evidence to be taken. The Enforcement Division presented material evidence necessary to prove the elements and appropriate penalty for Respondent's violation of Government Code section 87100 at the Administrative Hearing. Respondent appeared at the Administrative Hearing and also presented evidence. Respondent had proper notice of the charges against him, having been

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[7] If the Commission chooses to reject the proposed decision and decide the case upon the record, all of the following provisions apply:

(i) A copy of the record must be made available to the parties. The Commission may require payment of fees covering direct costs of making the copy.

(ii) The Commission itself must not decide the case without affording the parties the opportunity to present either oral *or* written argument before the Commission itself. If additional oral evidence is introduced before the Commission itself, no Commission member may vote unless the member heard the additional oral evidence.

(iii) The authority of the Commission itself to decide the case in this regard includes authority to decide some but not all issues in the case.

(iv) The Commission must issue its final decision not later than 100 days after rejection of the proposed decision, or not later than 100 days after receipt of the transcript, if the Commission ordered the transcript. The Commission may add another 30 days for special circumstances. (Section 11517, subd. (c)(2)(E), emphasis added.)

personally served with the Accusation. Additionally, Respondent had nearly six months' notice of the Hearing date. Respondent has provided no information or proof of any additional material (i.e., relevant) evidence that he could not, with reasonable diligence, have discovered and presented at the Administrative Hearing. Thus, because there is no additional evidence to be taken, referral back to ALJ Waxman does not apply.

Thus, if the Commission declines to adopt and make clarifying changes to the Proposed Decision, the remaining option is to reject the Proposed Decision of ALJ Waxman, and decide the case itself upon the record pursuant to Section 11517, subdivision (c)(2)(E).[7]

III. RESPONDENT'S SUBSTANTIVE ARGUMENTS ARE UNPERSUASIVE

A. The Commission Does Not Have Authority to Declare Any Law Unconstitutional or Unenforceable

Respondent argues that the conflicts of interests provisions in the Act are unconstitutionally vague, and therefore, the violation brought against him by the Enforcement Division is barred. However, the Commission may not decide the issue of whether the conflicts of interests provisions in the Political Reform Act are unconstitutionally vague or unenforceable because the California Constitution prohibits the Commission from declaring any statute unconstitutional or unenforceable. Section 3.5 of Article III of the California Constitution prohibits any administrative agency, including the Commission, from declaring a statute unconstitutional (Part 1); or unenforceable because it is either unconstitutional or prohibited by federal law, unless an appellate court has made a determination that such statute is either unconstitutional or prohibited by federal law (Parts 2 and 3). (Cal Const, Art. III § 3.5.) Under part 1, the Commission has no authority to declare a statute unconstitutional. Under parts 2 and 3, the Commission may not declare a statute unenforceable unless a California or federal appellate court has made a determination that the statute is unconstitutional or prohibited by federal law.

To date, no California or federal appellate court has made a determination that any of the conflicts of interests provisions in the Political Reform Act are unconstitutional or prohibited by federal

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law. Respectfully, therefore, the Commission may not decide the issue of whether any of the conflicts of interests provisions in the Political Reform Act are unconstitutional or unenforceable.[8]

B. Respondent Was Afforded All Constitutional Protections

1. The Law is Clear and Unambiguous

a. The statutes defining "public official" are sufficiently definite for due process.

Respondent argues that "[t]he government's policies are incurably vague and inconsistent as to whether Burgess is subject to the Political Reform Act in his capacity as a member of the Board of the nonprofit Hospital." (Response Brief, p. 4:13-15.) Respondent also claims that since Section 82048 does not include the words "non-profit corporation," Respondent was not given fair warning that Section 82048 would apply to the Hospital Board. (Response Brief, p. 4:22-27.)

Respondent's arguments fail. Due process does not require that Section 82048 specifically identify every possible type of entity to be included for the statute to be constitutionally valid. Instead, due process simply requires that a statute be "definite enough to provide ... a standard of conduct for those whose activities are proscribed...." (*Walker v. Superior Court* (1988) 47 Cal. 3d 112, 141, citing *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269, cert. den. 466 U.S. 967; *Kolender v. Lawson* (1983) 461 U.S. 352, 357-358.)

The statutes in the Act which define public official are sufficiently definite. "Local government agency" is a specifically defined term in Section 82041 of the Act. The definition of "public official" in Section 82048 includes the term "local government agency," and therefore, no analysis of Section 82048 can be made without including an analysis of Section 82041. The Act's definitions of "public official" and "local government agency" include members of any board of any local or regional political subdivision. Thus, Sections 82041 and 82048 are definite enough under a due process analysis to provide fair warning that Respondent was a public official as a member of the Hospital Board, and that the Hospital Board engaged in making governmental decisions, despite the Hospital's organizational structure.

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[8] The Commission recently held that it did not have authority to declare a statute unenforceable. (*In the Matter of Charles R. "Chuck" Reed, et al.* (September 19, 2013) FPPC Case No. 12/761.)

b. The Hospital Bylaws do not govern whether the Political Reform Act applies to members of the Hospital Board.

Respondent argues in his Response Brief that "Section 4.15 of the San Gorgonio Memorial Hospital Bylaws contains a statement that can only be interpreted to mean that the nonprofit Hospital Board members are not subject to the Political Reform Act." (Response Brief, p. 5:5-7.) However, regardless of the provisions contained in the Hospital Bylaws, the Hospital Bylaws do not govern whether the Political Reform Act applies to Respondent. Only the Act governs whether it applies to members of the Hospital Board. The Hospital Bylaws have no authority over whether the Act applies to Hospital Board members, and Respondent may not rely upon them to excuse his conduct.

It should be noted that Respondent contends that he gleaned from the Hospital Bylaws ethics training provisions that he was not a public official under the Act. (Response Brief, p. 5:13-16.) However, Respondent's contention is disingenuous. In one breath, he claims that he could not understand the clear definitions in the Act well enough to determine whether he was a public official. Yet in the next breath, he claims that he could "only conclude" that he was not a public official from the Hospital Bylaws provisions mandating "a course of training in ethics" enumerated in "Article 2.4 of Chapter 2 of Part I of Division 2 of Title 5 of the Government Code."[9] (Response Brief, p. 5:10-12.) In Respondent's words, he "cannot have it both ways." (Response Brief, p. 6:22.)

c. The evidence does not support Respondent's claim that the Hospital Board and Hospital Administration led him to believe that he was not subject to the Political Reform Act.

Respondent argues that it was not his fault that he didn't know the Act applied to him, contending that he "was led to believe by the District and the Hospital that he was not subject to the Political Reform Act while acting in his capacity as a member of the nonprofit Hospital Board." (Response Brief, p. 6:4-7.) However, Respondent does not identify any evidence admitted at the

[9] It should be noted that the law cited in the Hospital Bylaws – Section 53234, *et seq.* – is not part of the Political Reform Act. However, Section 53235 requires that the Fair Political Practices Commission be consulted if curricula to satisfy the ethics training requirements of Article 2.4 are developed. Additionally, Section 53234, *et seq.*, applies to both elected and non-elected local agency officials, as well as employees specified by the local agency. Pursuant to the applicable definitions, "local agency" includes any special district (Section 53234), and "legislative body" includes any board of a local agency (Section 54952).

Administrative Hearing which proved that the State, the District or the Hospital "led him to believe" that his conduct was not subject to the Act. To the contrary, the evidence admitted at the Administrative Hearing proved the opposite – that the District and the Hospital engaged in affirmative conduct that Respondent *was* subject to the Act as a member of the Hospital Board. For example, while Respondent was a member of the Hospital Board, members of the Hospital Board were required to file annual statements of economic interests, and both the Hospital Board Chair and Hospital Board's attorney regularly advised and/or warned Hospital Board members, regarding conflicts of interests pursuant to the Act. Thus, Respondent's contentions that the District and the Hospital led him to believe that he was not subject to the Act as a member of the Hospital Board are baseless.

2. Respondent was Amply Notified Prior to His Attempt to Influence the Hospital Board's Governmental Decision that the Political Reform Act Applied to His Conduct

The evidence also proved that Respondent was amply notified that the Act applied to him as a member of the Hospital Board immediately prior to the time he attempted to influence the governmental decision of the Hospital Board. The evidence proved that before and while he distributed the packet of materials to his fellow Hospital Board members, he was warned that he had a conflict of interest and was prohibited from distributing the packets and speaking to the Hospital Board regarding the Burgess northAmerican item. Additionally, Respondent was warned again when the agenda item was called during the meeting. However, in spite of these warnings, Respondent chose to distribute the packets and address his fellow Hospital Board members regarding the Burgess northAmerican contract. Thus, Respondent was amply notified that the Act applied to him as a member of the Hospital Board before he engaged in the prohibited conduct.

3. Respondent was Properly Notified of the Charges Against Him

The Enforcement Division prepared an Accusation in this matter in accordance with Government Code Section 11503 of the APA. Respondent was personally served with the Accusation on April 22, 2014, in accordance with Section 11505, and thereafter he timely filed a Notice of Defense in accordance with Section 11506. Thus, Respondent received proper notice of the charges against him, and his due process rights in this regard were protected.

4. Respondent Received a Full and Fair Opportunity to be Heard

This case was heard before ALJ Waxman on December 8 and 9, 2014. In his Response Brief, Respondent now claims that he did not receive a fair hearing. (Response Brief, p. 14, footnote 3.) Respondent's claim is misleading and baseless. During Respondent's case in chief, while passing out copies of documents he wished to introduce in evidence, Respondent volunteered that the documents were irrelevant to the case at hand. ALJ Waxman admonished Respondent, but did not prohibit Respondent from introducing further *relevant* evidence. ALJ Waxman gave Respondent every opportunity to present evidence at the hearing, as supported by the record of the proceedings. Respondent's attempt to introduce admittedly irrelevant evidence is not the equivalent to ALJ Waxman denying Respondent's due process right to a full and fair opportunity to be heard.

C. The Elements of Respondent's Violation of Section 87100 Were Established at the Administrative Hearing

1. Public Official and Governmental Decision

a. Respondent was a Public Official as a member of the Hospital Board, and the Hospital Board was a local government agency.

Respondent's contentions that he was not a public official[10] and that the Hospital Board did not make a governmental decision under the Act are blatantly incorrect. As shown in the Proposed Decision and Complainant's Opening Brief, the evidence admitted at the Administrative Hearing, when analyzed with the applicable law, proved by more than a preponderance of the evidence that Respondent was a public official under the Act and that he attempted to influence a governmental decision. The evidence showed that the Hospital Board was a board of the District, and thus, a local government agency. Consequently, its members were public officials, and its decisions were governmental decisions. Thus, as a member of the Hospital Board, Respondent was a public official. Further, the evidence showed that on April 6, 2010, Respondent attempted to use his official position as a Hospital Board member to influence a governmental decision of the Hospital Board when he gave a packet of informative materials

[10] It should be noted that Respondent states, "If an individual is not a public official, then he or she does not have a conflict of interest under the Political Reform Act. (Cal. Code of Regs. Section 18626)." (Response Brief, p. 2:27-3:1.) However, Regulation 18626 was repealed in 2001, and is not included in the group of regulations which pertain to conflicts of interests. Thus, the Enforcement Division cannot determine the regulation to which Respondent should have referred.

and attempted to speak to his fellow Hospital Board members before they voted on whether to approve an agreement with a competing company and discontinue storing documents with Burgess northAmerican. Thus, the evidence established the elements of public official and governmental decision.

b. The case law cited by Respondent is inapplicable to this case.

Respondent cites *Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal. App. 4th 208, as authority for his contention that he was not a public official as a member of the Hospital Board since the Hospital was a non-profit 501(c)(3) corporation. (Response Brief, p. 3:8.) However, the *Eden* decision does not apply to the present case, and therefore does not support Respondent's contention.

The *Eden* decision did not involve any provisions of the Act. The Act's conflicts of interests law is but one of several conflicts of interests prohibitions which currently exists in California. Regarding conflicts of interests, the *Eden* decision solely analyzed the applicable facts under provisions of Government Code section 1090 *et seq.*[11] Section 1090 *et seq.*, are separate and distinct statutes from the Act, encompassing separate and distinct terms and definitions from the Act. None of the Act's conflicts of interests prohibitions, terms or definitions refer to Section 1090 *et seq.* The Accusation in this case charges that Respondent violated Section 87100 of the Act, not Section 1090 *et seq.* Because the *Eden* decision does not analyze the statutes which are applicable to Respondent's conduct, the *Eden* decision is inapplicable, and does not support Respondent's contention that he was not a public official.

2. Economic Interest

Respondent contends that ALJ Waxman's conclusion regarding Respondent's economic interest was 1) legally incorrect because the facts do not support ALJ Waxman's legal conclusions; and 2) factually incorrect because the evidence did not prove that Respondent owned Burgess northAmerican, arguing that he "... does not own BNA. He is not a shareholder, nor does he have a financial interest in BNA." (Response Brief, p. 8:10-9:19.) However, Respondent's contention is unsupported. Respondent focuses solely on paragraph 11 of the Proposed Decision, but the Proposed

[11] "Section 1090 is the principal California statute governing conflicts of interest in the making of government contracts. In turn, the Political Reform Act is the principal California law governing conflicts of interest in the making of all government decisions." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1091.)

Decision must be read as a whole. In paragraph 4, the Proposed Decision makes the following factual findings:

> Respondent has also been a businessman for over 40 years. At all relevant times, he was President and Chief Executive Officer (CEO) of Banning Van & Storage, Inc., dba Burgess North American (BNA), a company engaged in the business of moving and storage. Initially incorporated in 1964, BNA 's officers included Respondent as President and his wife as Secretary. As of January 2010, Respondent's son, Todd Burgess was BNA's secretary following Mrs. Burgess's death. Respondent oversaw the Banning office. Todd Burgess oversaw the Palm Springs office. (Proposed Decision, p.2, ¶4.)

The Proposed Decision also found that Respondent disclosed his economic interest in Burgess northAmerican in his annual statements of economic interests. (Proposed Decision, p.2, ¶5.) These factual findings do not state that Respondent "owned" Burgess northAmerican, but they clearly support a finding that he had a "economic interest" in Burgess northAmerican pursuant to Section 87103, subdivision (d). (See footnote 3, above.) Thus, Respondent's contention fails.

3. Reasonable Foreseeability

Respondent contends that, regardless of the version of Regulation 18706 that is applied, the reasonable foreseeability element cannot be met. (Response Brief, p. 10:12-19.) Respondent's analysis is faulty in this regard. One must analyze the effect on the *economic interest* – Burgess northAmerican – *not* on the public official, and the evidence clearly proved a reasonably foreseeable material financial effect on Burgess northAmerican. Burgess northAmerican stood to lose a lucrative contract and would have unquestionably lost annual revenue if the Hospital Board approved an agreement with a competing document storage company. The mere fact that Respondent cared enough about the decision to ignore multiple warnings that he had a conflict of interests and make the effort to try to persuade his fellow Hospital Board members on the contract is strong evidence of reasonable foreseeability. Thus, not only was it reasonably foreseeable that Burgess northAmerican would lose the contract and annual revenue, it was certain Burgess northAmerican would lose the contract and annual revenue if the Hospital Board approved the new contract with Docu-Trust.

D. The Evidence Supports The Maximum Penalty

Respondent argues that he should not pay the maximum penalty for his violation of Section 87100 because: 1) he did not believe or know that the law applied to him; 2) he did not know he had an

economic interest in the company for which he had been president for 46 years; 3) he had a "long and distinguished career in public service" with no prior violations of the Act; 4) his conduct was not as bad as the conduct cited in prior enforcement matters; 5) none of the Hospital Board members actually read the packet; and 6) he abstained from the vote. (Response Brief, p. 14:19-15:17.)

None of these arguments are persuasive. Ignorance of the law is not a defense. Additionally, Respondent concedes that he was an experienced public official. As such, he should have known that the Act applied to him, or at the very least, consulted with Commission staff to determine whether the Act applied to him. As an experienced public official and businessman, he likewise should have known that he had an economic interest in Burgess northAmerican. Indeed, he regularly disclosed Burgess northAmerican in his annual statements of economic interests. Respondent's conduct in this case was deliberate and purposeful – he did not accidentally prepare and distribute the packets, and he continued to attempt to influence the vote even after repeated admonishments. Conflicts of interests violations are serious violations of the Act. Despite this being an isolated incident, Respondent's deliberate attempt to influence the vote of his fellow Hospital Board members was every bit as serious as the conduct cited in prior Commission prosecutions. Additionally, the law is "attempting to influence" not "actual influence," thus, whether the Hospital Board members read the packet is irrelevant. Moreover, in light of Respondent's egregious attempt to influence the vote of his fellow Hospital Board members, the fact that he abstained from the vote cannot mitigate the penalty.

ALJ Waxman examined the mitigating factors, and he determined that the mitigating factors were "...insufficient to warrant a reduction of the monetary penalty from the maximum amount allowable by law, specifically, $5,000 for the single violation." (Proposed Decision, p.13¶17.) Thus, the maximum penalty is appropriate.

IV. CONCLUSION

The only issue before the Commission is whether to adopt the Proposed Decision of ALJ Waxman with technical, clarifying changes, or whether to reject the Proposed Decision of ALJ Waxman, and decide the case itself upon the record.

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The Proposed Decision reaches the just and reasonable result in this case. The evidence presented at the Administrative Hearing, when analyzed with the applicable law, proved that Respondent violated Government Code Section 87100 on April 6, 2010, when he attempted to use his official position to influence a governmental decision which directly impacted the corporation for which he was president. Additionally, the evidence supports an order that he pay the maximum penalty.

Therefore, the Enforcement Division respectfully recommends that the Commission adopt the Proposed Decision of ALJ Waxman with clarifying changes, as previously detailed in the Enforcement Division's Opening Brief, or in the alternative, reject the Proposed Decision of ALJ Waxman, and decide the case itself upon the record.

Dated: February 13, 2015

FAIR POLITICAL PRACTICES COMMISSION

By: Gary S. Winuk
Chief of Enforcement

Angela J. Brereton
Senior Commission Counsel

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814. On February 13, 2015, I served the following document(s)/attachment(s):

1. In the Matter of Frank J. Burgess – OAH No. 2014060674, FPPC Case No. 12/516: REPLY BRIEF OF THE ENFORCEMENT DIVISION OF THE FAIR POLITICAL PRACTICES COMMISSION RE: PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE H. STUART WAXMAN

☒ By Personal Delivery. I personally delivered the original and six copies of the document(s) listed above to the person(s) at the address(es) as shown on the service list below.

☒ By email or electronic transmission. I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail in Sacramento County, California.

SERVICE LIST

Personal and Email Delivery

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Email Delivery

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 13, 2015.

Camille Marzion